BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVANGELINA GRAJEDA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,013,096
ARAMARK UNIFORM SERVICES	)	
Respondent	)	
AND	)	
	)	
BANKERS STANDARD INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the July 27, 2004 Settlement Award entered by Special Administrative Law Judge John Nodgaard. The Board heard oral argument on January 18, 2005, in Wichita, Kansas.

APPEARANCES

Kelly W. Johnston of Wichita, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The transcript and accompanying attachments from the July 27, 2004 settlement hearing, which include the parties' stipulations, comprise the record.

ISSUES

Claimant appealed the July 27, 2004 Settlement Award that was entered in her claim for an "accident of August 11, 2003, [and] each and every working day thereafter."[1] In short, claimant argues the lump sum settlement was not in her best interest and that Judge Nodgaard erred in the following respects:

[1] S.H. Trans. at 3.

> (1) the Judge failed to make a finding that the lump sum settlement was in claimant's best interest as required by K.S.A. 44-531,
>
> (2) the Judge failed to comply with K.A.R. 51-3-1 and K.A.R. 51-3-9, the latter requiring a worker to testify that he or she has read the medical reports introduced as evidence at the settlement hearing, or has had the reports read to him or her, and that the worker fully understands the medical evidence regarding disability, and
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> (3) the Judge did not have the authority to enter the Settlement Award as claimant had inadequate notice of the hearing and claimant did not formally waive the notice required by K.S.A. 44-534(a).

Claimant also attacks the Settlement Award on the basis that there was mutual mistake of fact.

Accordingly, claimant requests the Board to set aside the Settlement Award. In the alternative, claimant asks the Board to remand this claim to an administrative law judge "in order that a complete factual record can be developed."[2]

Conversely, respondent and its insurance carrier contend this appeal should be dismissed as the Board does not have jurisdiction under K.S.A. 44-528 to review the Settlement Award. In the alternative, respondent and its insurance carrier argue the Settlement Award should be affirmed.

Respondent and its insurance carrier argue the Judge determined the settlement was in claimant's best interest. They emphasize the settlement hearing worksheet presented at the settlement hearing recited that the settlement was in claimant's best interest. Moreover, they argue the Judge determined the settlement agreement was fair, just, and reasonable, which should satisfy any requirement that the settlement was in claimant's best interest.

Next, respondent and its insurance carrier contend the requirements of K.A.R. 51-3-1 and K.A.R. 51-3-9 were satisfied. They also argue claimant should be estopped from challenging notice of the settlement hearing as claimant appeared with her attorney without objecting to the hearing. They stress the settlement hearing worksheet stated that claimant was waiving formal notice of the hearing. And finally, respondent and its insurance carrier contend it would be against public policy to set aside the Settlement Award as claimant was represented by counsel at the settlement hearing.

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[2] Claimant's Brief at 2 (filed Sept. 13, 2004).

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the July 27, 2004 Settlement Award?

2. Did claimant's settlement hearing comply with the requirements of K.S.A. 44-531 and Kansas Administrative Regulations? If not, should the Settlement Award be set aside?

3. Should the Settlement Award be set aside on the basis that there was a mutual mistake of fact?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the Board finds and concludes:

On July 27, 2004, claimant appeared with an attorney for a settlement hearing before Special Administrative Law Judge John Nodgaard. Claimant did not object to the settlement hearing or otherwise raise any issue regarding notice to the Judge.

The parties presented Judge Nodgaard a document entitled Worksheet for Settlements, which set forth the terms of the parties' settlement agreement, that the settlement was in claimant's best interest, and that claimant waived formal notice of the settlement hearing. That document reads, in part:

> This is a strict compromise lump sum settlement in the amount of $5,000.00 representing approximately a 6% permanent partial disability general bodily disability which respondent and insurance carrier have offered and claimant has accepted. This is full and final settlement of all claims arising out of claimant's accident on 08/11/03 and each and every working day thereafter. This settlement is agreed by all parties to constitute a K.S.A. 44-531 complete and full redemption. Claimant waives formal notice of this hearing and believes it is in his/her best interest to receive this settlement in one lump sum.
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> The parties have considered the possibility of future medical expenses for this claimant related to her worker's compensation injury and have determined that no future medical expenses are anticipated. Further, the claimant is not currently receiving or made application for Medicare benefits or Social Security Disability benefits at the time of this settlement hearing. Lastly, claimant does not anticipate applying for Medicare or Social Security Disability benefits within 30 months from July 8, 2004, the date of the settlement hearing.

Likewise, the parties presented to the Judge a copy of a May 14, 2004 medical report from Dr. C. Reiff Brown concluding claimant "suffered a sprain of scapular

musculature as well as a cervical sprain, which is superimposed on degenerative disc disease at C5-6 and 6-7." Dr. Brown rated claimant as having a five percent whole body functional impairment and recommended avoiding certain activities. The parties also provided the Judge with a copy of a June 7, 2004 report from Dr. Paul S. Stein, which also indicated claimant had a five percent whole body functional impairment and that she should avoid certain activities.

At the settlement hearing, the Judge entered an award based upon the parties' settlement agreement. Before entering that award, however, the Judge reviewed with claimant various rights that she was waiving in order to receive the lump sum payment of $5,000. At the hearing, claimant answered in the affirmative that she understood she was responsible for all future medical expense she incurred that was related to this claim, that she was giving up her rights to litigate this claim and to appeal, that she was waiving her rights to review and modification of her award, and that $5,000 was all the money she would ever receive as a result of the claimed injury. The Judge stated, in part:

> Then after reviewing the worksheet for settlement, hearing statements of counsel and testimony from the claimant, the Court will find the proposed settlement is fair, just and reasonable and will approve the same, and I will order Aramark and its insurance carrier to pay to the claimant $5,000 for a full, final and complete settlement of all claims arising out of this injury, and upon the payment of said sum it will constitute a full redemption in accord with KSA 44-531. Do we have a check present today?[3]

At the conclusion of the settlement hearing, respondent and its insurance carrier's attorney presented claimant a check for $5,000. Claimant answered in the affirmative that she was accepting the check in "full, final and complete settlement and satisfaction of [her] claim against Aramark under the terms just described by Judge Nodgaard."[4]

On August 10, 2004, the Division of Workers Compensation received claimant's application for review by the Workers Compensation Board of the July 27, 2004 Settlement Award entered by Judge Nodgaard.

Does the Board have jurisdiction to review the July 27, 2004 Settlement Award?

Respondent and its insurance carrier argue the Board does not have jurisdiction to address the issues claimant raises in this appeal because K.S.A. 44-528, which is the

[3] S.H. Trans. at 7.

[4] *Id.* at 7-8.

review and modification statute, does not permit the review or modification of lump sum settlement awards.

The Board, however, concludes respondent and its insurance carrier's reliance upon K.S.A. 44-528 is misplaced as that statute is not applicable to this appeal. On the other hand, claimant's appeal is timely under the provisions of K.S.A. 2003 Supp. 44-551(b)(1), which provides, in part:

> All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days.

Accordingly, the Board has jurisdiction and authority to review whether the settlement hearing complied with the Workers Compensation Act and the related administrative regulations.

Did claimant's settlement hearing comply with the requirements of K.S.A. 44-531 and Kansas Administrative Regulations?

Both the Kansas legislature and the Division of Workers Compensation (by way of administrative regulations) have enacted provisions to protect injured workers regarding lump sum settlement awards. K.S.A. 44-531(a) provides:

> Where all parties agree to the payment of all or any part of compensation due under the workers compensation act or under any award or judgment, and where it has been determined at a hearing before the administrative law judge that it is for the best interest of the injured employee or the dependents of a deceased employee, or that it will avoid undue expense, litigation or hardship to any party or parties, the administrative law judge may permit the employer to redeem all or any part of the employer's liability under the workers compensation act by the payment of compensation in a lump sum, except that no agreement for payment of compensation in a lump sum shall be approved for nine months after an employee has returned to work in cases in which the employee, who would otherwise be entitled to compensation for work disability, is not entitled to work disability compensation because of being returned to work at a comparable wage by the employer who employed the worker at the time of the injury giving rise to the claim being settled. The employer shall be entitled to an 8% discount except as provided in subsection (a) of K.S.A. 44-510b and amendments thereto on the amount of any such lump-sum payment that is not yet due at the time of the award. Upon paying such lump sum the employer shall be released and discharged of and from all liability under the workers compensation act for that portion of the employer's liability redeemed under this section.

Before a lump sum settlement is entered, K.S.A. 44-531 requires a judge to first determine whether the lump sum payment is in the best interest of the worker or that the settlement will avoid undue expense, litigation or hardship to any party. And in those claims in which a worker returns to work for his or her pre-injury employer and otherwise would be entitled to receive a work disability,[5] the judge must also determine whether the worker has been back to work for more than nine months. But the transcript from the settlement hearing does not reflect the parties addressed those matters or the Judge's findings concerning those issues.

Moreover, a finding that the lump sum settlement is fair, just and reasonable is not the equivalent to finding that a settlement is in a worker's best interest. In *Johnson*,[6] the Kansas Supreme Court mentioned several factors that were important when considering whether a lump sum settlement or redemption was in a worker's better interest – (1) the nature of the injury and its effect upon earning capacity, (2) the duration of the incapacity, and (3) the likelihood of a cure or improvement. More importantly, the Kansas Supreme Court stated it was hesitant to attempt to list all the possible factors that would support a lump sum redemption as no inflexible rule could be laid down. Nevertheless, the Court concluded the legislature intended there exist some unusual or exceptional circumstance to justify departing from the normal method of payment of compensation and terminating all rights and liabilities afforded by the Workers Compensation Act. The *Johnson* decision reads, in part:

> No inflexible rule can be laid down. However, we think the legislature had in mind that some unusual or exceptional circumstances should exist to justify departure from the normal method of payment of compensation and termination of all rights and liabilities under a continuing award.[7]

Administrative regulations further protect workers in settlement awards. K.A.R. 51-3-9 provides:

> The administrative law judge shall not issue a settlement award unless: (a) the claimant personally testifies; (b) medical testimony by a competent physician is introduced as evidence, either by the oral testimony of that physician, or through a documentary report of a recent physical examination of the claimant as to the extent of the claimant's disabilities; and (c) any other testimony as the administrative law judge may require for the proper determination of the extent of disability and the

[5] A permanent partial general disability determined under K.S.A. 44-510e that is greater than the functional impairment rating.

[6] *Johnson v. General Motors Corporation*, 199 Kan. 720, 433 P.2d 585 (1967).

[7] *Id.* at 727.

> amount of compensation due, if any. If documentary evidence of a medical report covering physical examination of the claimant is introduced in evidence, the claimant shall be able to testify that the claimant has read that report or had the report read to him or her, and that the claimant fully understands the medical evidence as to disability.
>
> If the injured worker submits to hospitalization, the records of the hospitalization and treatment, properly identified, may be received in evidence at a hearing on a claim.
>
> Medical and hospital expenses shall be made part of the record.

As K.A.R. 51-3-9 provides, a judge shall not enter a settlement award unless there is medical evidence addressing the worker's disability. And when there is a medical report presented, the worker must either read the report or have the report read to him or her. Moreover, the worker must fully understand the medical evidence regarding his or her disability. But the transcript from the July 27, 2004 settlement hearing does not establish whether claimant had read the medical reports introduced at that hearing or whether those reports had been read to her or whether she fully understood the medical evidence concerning her injury.

Claimant's attack on the Settlement Award has raised issues that were not addressed at the administrative law judge level. Accordingly, the parties should be afforded the opportunity to compile an evidentiary record to support their legal theories. Consequently, this claim should be remanded to an administrative law judge for further delineating the issues, setting the parties' terminal dates for taking evidence, and decision.

Based upon the above, the Board is not required to address the issue of whether the Settlement Award should be set aside due to mutual mistake.

AWARD

WHEREFORE, the Board remands this claim to an administrative law judge for the parties to present evidence and for the judge to address claimant's request to set aside the July 27, 2004 Settlement Award. The Board does not retain jurisdiction over this claim and the parties shall be required to file an application for review should they disagree with the judge's decision.

IT IS SO ORDERED.

Dated this ____ day of February 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John Nodgaard, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director